UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

VERIZON CALIFORNIA, INC.

and

Case No. 21-CA-039382

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 9588, AFL-CIO

RESPONDENT'S ANSWERING BRIEF TO THE CHARGING PARTY AND COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to Section 102.46(d) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Verizon California ("Verizon" or the "Company") submits this Answering Brief to the Charging Party and Counsel for General Counsel's Exceptions to the March 20, 2014 Decision of Administrative Law Judge Mary Miller Cracraft ("the ALJ") in the above-captioned matter.[1]

As set forth below, the Board should affirm the ALJ's factual and legal rulings, findings, and conclusions and adopt the recommended Order dismissing the Amended Complaint against Verizon. The ALJ correctly found that the award issued by Arbitrator Philip Tamoush was not clearly repugnant to the Act, and therefore, deferred to the award pursuant to the well-established, post-arbitration standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984) ("*Spielberg/Olin*"). In addition, for the reasons noted

[1] The Board granted Charging Party's request for an extension of time — ordering that the Exceptions be filed on or before May 5, 2014. Accordingly, Verizon's Answering Brief is timely filed within 14 days from the last date that the Exceptions were due pursuant to Board Rule 102.46(d).

herein and despite the Counsel for the General Counsel's arguments to the contrary, Verizon advocates that the NLRB should maintain its longstanding *Spielberg/Olin* deferral standards.[2] But, even under the modified deferral standard sought by the General Counsel, deferral to Arbitrator Tamoush's award would be appropriate and would not change the outcome here.

I. INTRODUCTION

On June 11, 2010, Communications Workers of America Local 9588 ("Union" or the "Charging Party"), filed a charge on behalf of Bryan Rodriquez ("Rodriguez"), a Verizon Customer Service Technician. The Union alleged that Verizon violated the Act when it suspended Rodriguez for insubordination after he refused to answer his supervisor's questions during a June 9, 2010 telephone conversation regarding his job performance because Rodriguez was denied union representation under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The Region deferred the matter pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and a hearing was held before Arbitrator Tamoush on January 17 and February 16, 2012. Based on all the facts and evidence presented at the hearing, on April 7, 2012, Arbitrator Tamoush upheld the one-day suspension and found that Rodriguez did not possess *Weingarten* rights because he did not have a reasonable belief that discipline could result from the routine conversation with his supervisor.

On December 31, 2012 and February 19, 2013, the Region issued a Complaint and Amended Complaint against Verizon alleging a *Weingarten* violation of Section 8(a)(1) and (3). In lieu of a hearing, on February 14, 2014, the parties submitted briefs regarding their respective

[2] The Board is currently deciding whether to modify the post-arbitration deferral standard in the matter of *Babcock & Wilcox Construction and Coletta Kim Beneli*, NLRB Case No. 28-CA-022625. Depending on how the Board rules on this issue, Verizon respectfully requests supplemental briefing.

positions on deferral to the arbitration award based on a stipulated factual record. On March 20, 2014, the ALJ concluded that the arbitration award was not clearly repugnant to the Act and deferred to the award pursuant to the *Spielberg/Olin* deferral standards.

The Union and Counsel for the General Counsel now except to the ALJ's decision and contend that Arbitrator Tamoush's award is repugnant to the Act and does not satisfy the *Spielberg/Olin* standards. While the General Counsel's argument purports to rely on the current established standard (*i.e.*, that Arbitrator Tamoush's award is "repugnant to the Act"), the General Counsel realizes that in order to have any chance of prevailing in this matter, the Board must reject the current standard and adopt a wholly new one. The new standard urged by the General Counsel seeks to impair the longstanding federal labor policy favoring arbitration by placing the burden on the party urging deferral and requiring that the arbitrator correctly enunciate and apply the statutory principles at issue.

Ultimately, the Union and General Counsel's position reduces to a disagreement with the Arbitrator's factual findings and ultimate result. The Union and General Counsel seek to substitute their own viewpoint for the Arbitrator's factual conclusions, witness credibility determinations, and holding that Rodriguez did not have a reasonable belief that discipline would result from participating in a routine conversation with his supervisor. This is not a basis for denying deferral.

As discussed below, Board precedent requires that the ALJ's decision should be affirmed and the Amended Complaint be dismissed pursuant to the Board's longstanding deferral principles set forth in *Spielberg/Olin*. There is nothing "palpably wrong" with the Arbitrator's finding in this case. Rather, the facts presented at the hearing, coupled with the credibility determinations made by Arbitrator Tamoush, amply support a finding consistent with the Act

and supported by Board precedent. Even if the Union and General Counsel believe the ALJ should have come to a different result, it does not matter. *Kvaerner Philadelphia Ship,* 347 NLRB 390, 394 (2006); *Olin,* 268 NLRB at 574 ("an arbitrator…need not decide it in a manner totally consistent with Board precedent"); *Bell-Atlantic-Penn., Inc.*, 339 NLRB 1084 (2003) ("[T]he arbitrator's award need not be totally consistent with Board precedent to warrant deferral.").

Furthermore, the Counsel for the General Counsel's attempt to change the standard for deferral would effectively gut deferral, ignoring decades of precedent and refusing to acknowledge the paramount importance of arbitration to federal labor policy. In any event, applying the General Counsel's proposed standard here would not alter the end result. Arbitrator Tamoush clearly enunciated the correct *Weingarten* principles by referring to and incorporating the detailed explanation of another similar arbitration award and he correctly applied the objective standard to an inherently fact-specific inquiry. Therefore, refusal to defer to the Arbitrator's award, where the standards for deferral were plainly met even under the General Counsel's proposed standard, would be wrong.

II. FACTUAL BACKGROUND

A. The Region Initially Deferred The Charge.

On June 11, 2010, Verizon suspended Rodriquez for insubordination. [Ex. 4 at ¶7; Ex. 10 at pp. 86-87, 766.][3] That same day, the Union filed the instant unfair labor practice charge with Region 21 claiming that Verizon "discriminated against [Rodriguez] for his engaging in union and/or protected concerted activities…[and] violated [Rodriguez's] *Weingarten* rights" in

[3] Citations to the record are as follows: the ALJ's decision is cited as "Decision [Page]:[Lines]" and all exhibit references are to those documents attached to the Joint Stipulation of Record and Limited Stipulation of Facts.

violation of 8(a)(1) and 8(a)(3) of the Act. [Ex. 1.] In addition, the Union filed a grievance on behalf of Rodriguez challenging the suspension under the collective bargaining agreement in effect between Verizon and the Union. [Ex. 10 at pp. 10, 653.]

The Region deferred the Charge to the grievance and arbitration procedures of the parties' collective bargaining agreement in an August 9, 2010 letter stating:

> Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that such allegations may be resolved through the grievance/arbitration procedure.

[Ex. 9a at p. 2.] Additionally, the letter explained that the Arbitrator's award would be reviewed pursuant to the post-arbitration deferral standards set forth in *Spielberg/Olin*:

> If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were consider by the arbitrator, and whether the award is clearly repugnant to the Act. Further guidance on the nature of this review is provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

[Ex. 9a at p. 2.] The Union appealed the Region's decision to defer and, on November 12, 2010, the General Counsel denied the appeal — concluding that the statutory issue could be resolved through the parties' grievance/arbitration procedures. [Ex. 9b.] Subsequently, the Union pursued Rodriguez's grievance to arbitration in accordance with the parties' collective bargaining agreement.

B. <u>The Parties Argued Their Respective Positions Regarding *Weingarten* At The Arbitration Hearing.</u>

On January 17, 2012 and February 16, 2012, an arbitration hearing was held before the mutually selected Arbitrator, Philip Tamoush, during which the Company presented three witnesses and the Union presented two witnesses. [*See generally* Ex. 10.] During the 400-page

recorded hearing, the Company and the Union questioned every witness and presented oral closing arguments detailing their positions. [*Id*.]

At the outset of the hearing, Arbitrator Tamoush was apprised of the instant charge and the Union requested that the Arbitrator provide the Board with a copy of his award. [Ex. 10 at pp. 9-10, 406.] Subsequently, at the hearing, the parties presented evidence relating to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and argued the impact of the case in assessing Rodriguez's conduct. [*See generally* Ex. 10.]

The substance of the arbitration hearing centered on Rodriguez's refusal to answer his supervisor's questions about a particular GPS record regarding a long-duration job assigned to Rodriguez. [Ex. 10 at pp. 57-60, 67, 72-74, 77-81.] Rodriguez's supervisor, Paula Cooper, testified that she needed information in order to provide a routine report to her supervisors, but Rodriguez refused to provide the requested information. [*Id.*] Specifically, the evidence at the hearing revealed the following:

- Cooper called Rodriguez to inquire about a particular job from the prior day after reviewing her daily GPS work reports [*id*. at p. 72];
- Cooper informed Rodriguez that this was a "normal conversation", they "have done this before", and that she needed the information urgently to prepare a routine report [*id*. at pp. 72, 75];
- Cooper routinely contacted employees, including Rodriguez, to inquire about their jobs when she reviewed the daily work reports [*id*. at pp. 63, 66-72];
- Although Rodriguez was on a Performance Improvement Plan ("PIP") at the time of the conversation, Cooper had previously called Rodriguez to follow up on his work

records while he was on other PIPs, and Rodriguez had never been disciplined by Cooper [*id*. at 77-81, 157-160];

- The parties' collective bargaining agreement provides that a supervisor cannot discipline an employee based on the GPS records at issue without a prior warning, which Rodriguez had not received [*id*. at pp. 81-82, 86];
- Rodriguez claimed that he had "done a very good job" on the particular job at issue — rebutting his belief that he could have been disciplined [*id*. at p. 291]; and
- Rodriguez was ultimately suspended for insubordination after he refused to provide Cooper with information regarding his job [*id*. at pp. 75-76].

Notwithstanding these facts, the Union argued that Rodriguez was suspended for engaging in protected activity under the Act. [*See generally* Ex. 10.] More specifically, in its closing argument, the Union argued that Rodriguez invoked his *Weingarten* rights during his conversation with his supervisor. [Ex. 10 at pp. 389-398.] In this regard, the Union alleged that Rodriguez reasonably believed his conversation with Cooper could lead to discipline because he was on a PIP at the time of the conversation. [*Id*.]

The Company, in contrast, argued that *Weingarten* did not apply to the situation at hand because Cooper merely intended to have a routine conversation with Rodriguez to get more details regarding the GPS records. [Ex. 10 at pp. 379-389, 398-399.] The Company presented evidence that at no time did Rodriguez cite or mention a concern about being subject to discipline as a reason he would not respond to Cooper's questions. [*Id*.] Beyond that, the Company presented evidence that such conversations rarely lead to discipline because there are numerous non-disciplinary reasons for why a job may take longer than normal. [*Id*.] Further, while Rodriguez was on a PIP at the time of the conversation, he had been on a PIP numerous

times in the past and had not been disciplined after similar routine conversations. [*Id*. at pp. 106-108, 379-389, 398-399.] The Company also reiterated that the collective bargaining agreement prohibited discipline against Rodriguez for a single long-duration job based on GPS records because he had not been previously warned about any potential issues. [*Id*. at pp. 379-389, 398-399.] Against this backdrop, the Company argued that the notion that Rodriguez believed he could be disciplined was an after-the-fact contrivance and, in any event, could not have been a reasonably held belief. [*Id*.]

As part of its closing argument, the Company also introduced an arbitration award by Arbitrator William Petrie involving a similar claim by the Union that another Verizon employee, Wanda Walker, was improperly suspended for invoking her *Weingarten* rights (hereinafter referred to as "*Walker* award"). [Ex. 10 at p. 381; Ex. 11 at pp. 8-32.][4] As in the instant case, Walker refused to speak with management to resolve an important customer issue. Under these facts, Arbitrator Petrie held that the meeting with Walker was not investigatory in nature and *Weingarten* rights were not applicable — upholding the suspension for insubordination after a detailed analysis of the proper *Weingarten* standard. The Company argued that Arbitrator Petrie's award is directly on point and justified the discipline imposed on Rodriguez.

C. The Arbitrator Issued An Award That Properly Enunciated And Applied The *Weingarten* Principles.

On April 7, 2012, Arbitrator Tamoush issued an award concluding that Verizon had just cause to suspend Rodriquez. [Ex. 11 at pp. 1-7.] The Arbitrator expressly recognized that the

[4] Notably, a charge also was filed by the Union relating to the *Walker* award referenced in Arbitrator Tamoush's decision. As here, the case was initially deferred to arbitration under *Collyer*. Unlike this case, however, the Region did defer to the final *Walker* award. [*See* Verizon California, Inc., NLRB Case Number 31-CA-29411.] The Region has provided no reasoned explanation for its inconsistent treatment of the two nearly identical charges.

matter was pending before the NLRB and incorporated the *Weingarten* standards as enunciated in detail by the *Walker* award (which was attached to his award). [*Id.* at pp. 6, 18-20.] Arbitrator Tamoush also acknowledged the parties' respective positions regarding Rodriguez's PIP and how it may have affected the reasonableness of his belief that he could have been disciplined. [*Id.* at pp. 3-5.] However, upon review of the *Weingarten* standards, Arbitrator Tamoush stated:

> [T]he Company exercised its rights reasonably in denying Rodriguez Union representation when Cooper was soliciting information from him regarding his long-duration job. The expectation that [Rodriguez] might be disciplined as a result of Cooper's inquiry was unreasonable, considering all of the facts as presented.

[*Id*. at p. 6] Since Rodriguez did not engage in protected activity when he refused to speak with his supervisor, Arbitrator Tamoush found that the Company had just cause to suspend him for insubordination. [*Id*.]

After reviewing the instant award, the Region informed the Company that it would not defer. It issued a Complaint on December 31, 2012 [Ex. 2] and an Amended Complaint on February 19, 2013. [Ex. 4.]

III. ARGUMENT

The Board should affirm the ALJ's factual and legal rulings, findings, and conclusions and adopt the recommended Order dismissing the Amended Complaint against Verizon. The ALJ correctly found that the award issued by Arbitrator Philip Tamoush was not clearly repugnant to the Act and deferred to the award pursuant to the well-established, post-arbitration deferral standards set forth in *Spielberg/Olin*. Further, although the ALJ and the Amended Complaint rely upon *Spielberg/Olin* as the standard for deferral, the Counsel for the General Counsel contends that heightened deferral standards should be imposed — specifically, placing the burden on the party urging deferral to show proper enunciation and application of statutory principles. Board authority does not support these new proposed requirements, but in any event,

they would not alter the result in this case because the Arbitrator did properly enunciate and apply the applicable principles.

A. Overview Of The *Spielberg/Olin* Standard for Deferral.

Under well-established Board principles related to deferral and a "national policy that strongly favors the voluntary arbitration of disputes," the Region must defer to an arbitration award and dismiss any related unfair labor practice charges if the award meets the following standards set forth in the Board's seminal decisions of *Spielberg Mfg Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984):

1. The arbitration proceeding must have been "fair and regular." *Spielberg*, 112 NLRB at 1082; *Olin*, 268 NLRB at 573-74.
2. The parties must have agreed to be bound by the arbitration award. *Id.*
3. The arbitrator must have considered the unfair labor practice at issue. *Id*.
4. The arbitration decision must not be "clearly repugnant to the purposes and policies of the Act." *Id.*

"[A] 'heavy burden' is on the party opposing deferral to show that an arbitration decision does not merit deferral by the Board under these standards." *Aramark Services., Inc*., 344 NLRB 549 (2005) (*citing Martin Redi-Mix*, 274 NLRB 559 (1985); *Olin*, 268 NLRB at 574. Thus, where the parties have generally agreed to be bound by an Arbitrator's resolution of an issue, the Board will defer to that resolution, except in those rare cases in which the Arbitrator's decision is inherently repugnant or "palpably wrong." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1085 (2003). This means that the Board will defer unless the award is *not susceptible* to an interpretation consistent with the Act. *Aramark*, 344 NLRB 549.

As the Board noted in *Aramark*, the party opposing deferral must show that the Arbitrator's decision is palpably wrong. The Board will not readily set aside an Arbitrator's resolution of an unfair labor practice charge where the issue before the Arbitrator was factually parallel to the charge and the Arbitrator was presented with all the facts relevant to the charge. Furthermore, even where the Board would reach a different conclusion than that of the arbitrator, deferral nonetheless is warranted:

> 'Susceptible to an interpretation consistent with the Act' means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, 'consistent with the Act' does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

Smurfit-Stone Container Corp., 344 NLRB 658, 659-660 (2005); *see also Aramark*, 344 NLRB at 549. If Board authority exists that supports an Arbitrator's decision, it cannot be said that the decision falls outside the broad parameters of the Act. In addition, a decision is not palpably wrong or clearly repugnant to the Act, even if other Board precedent is arguably contrary to the arbitral decision. *See Marty Gutmacher, Inc.*, 267 NLRB 528 (1983) (Board adopted judge's deferral to an arbitrator's finding despite existence of Board cases to the contrary, because other Board cases supported the finding).

B. <u>The ALJ Correctly Applied *Spielberg/Olin* To Defer To The Arbitration Award.</u>

The ALJ correctly found that each of the *Spielberg/Olin* requirements for deferral to Arbitrator Tamoush's award has been satisfied: (1) there was a fair and regular hearing, (2) the parties agreed to be bound by arbitration, (3) the issue before the Arbitrator was factually parallel to the alleged unfair labor practice, and (4) the Arbitrator's decision was not clearly repugnant to the Act. The ALJ also correctly noted that the parties all agree that the first three deferral criteria

have been met. [Decision at 7:1-20.] Nevertheless, each of these criteria are addressed below to show that the ALJ's findings and conclusions were correct.

1. *The Proceedings Were Fair And Regular.*

The ALJ correctly found that the instant arbitration proceeding was fair and regular. [Decision at 7:5-9.] The Charging Party and the Counsel for the General Counsel do not dispute this conclusion. The hearing was run pursuant to the "established contractual forum for contesting disciplinary actions." *See, e.g., Aramark*, 344 NLRB 549. The parties were in no way restricted from presenting all witnesses or arguments in their favor, including those implicating *Weingarten*. Also, as the ALJ concluded, the parties "were given full opportunity to present, question, and cross-examine witness[es] and to submit documents in support of their positions." [Decision at 7:6-9.] Furthermore, Arbitrator Tamoush issued an award that set forth his finding on the *Weingarten* issue — that Rodriguez's *Weingarten* rights were not implicated on June 9, 2010, and that his conduct supported the suspension. The first factor for deferral has been easily met.

2. *The Parties Agreed To Be Bound By Arbitration.*

The ALJ correctly found that it is also undisputed that the parties agreed to be bound by the arbitration award. [Decision at 7:10-11.] The grievance and arbitration provisions of the collective bargaining agreement encompassed the Union's grievance and the Union fully participated and did not object to being bound by the results of the arbitration. Therefore, the second factor has also easily been met.

3. *The Arbitrator Considered The Unfair Labor Practice Charge At Issue.*

There is also no dispute that the ALJ correctly found that the Arbitrator considered the unfair labor practice charge at issue. [Decision at 7:11-18.] The matter before the Arbitrator was

factually parallel to the unfair labor practice at issue — both turn on whether Rodriguez's refusal to speak with his supervisor was protected by *Weingarten*. Indeed, the Arbitrator was presented with the same facts that would be presented to the ALJ or the Board in any unfair labor practice hearing. In addition, as the ALJ noted, the Arbitrator was informed of the unfair labor practice proceeding, resolved the *Weingarten* issue through his decision, and forwarded his award to the NLRB. [Decision at 7:11-18.] This clearly meets the third element of the Board's deferral standard. *See Olin*, 268 NLRB at 504 ("We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.").

4. *The Award Is Not Clearly Repugnant To The Act.*

The ALJ correctly ruled that the arbitration award was "not clearly repugnant to the Act's purposes and policies." [Decision at 7:20.] The ALJ noted the correct standard for determining whether an Arbitrator's decision is "clearly repugnant" to the Act under *Olin* is whether the award is "palpably wrong" and "not susceptible to an interpretation consistent with the Act." [Decision at 7:22-30.] The ALJ further stated that even though "it is possible to reach a different result than the Arbitrator[,] . . . this fact alone does not render the award clearly repugnant or palpably wrong." [Decision at 7:36-38.] Deferral is required here because Arbitrator Tamoush made reasoned credibility and factual determinations consistent with the Act.

Cases involving *Weingarten* turn on the facts and circumstances of the case presented. A fact finder must specifically determine whether it was reasonable for the employee to believe that a conversation would lead to discipline. The Board recently noted that whether or not an employee has a "reasonable belief" in such cases often leads to varying results. *See Las Palmas*

Medical Center, 358 NLRB No. 54 at *35-36 (2012) ("The Board and the courts, . . . have had difficulty in determining under what circumstances a reasonable basis exists for believing that the investigatory interview will result in disciplinary action.")

Notwithstanding the highly fact specific inquiry required, the Charging Party and Counsel for the General Counsel now seek to challenge the Arbitrator's factual and credibility determinations to argue that the Arbitrator's award was repugnant to the Act. In fact, as alleged in the Amended Complaint, the General Counsel seeks to re-litigate whether Rodriguez "had reasonable cause to believe" that his interaction with Cooper "would result in disciplinary action." [Ex. 4 at ¶ 6(c).] Whether or not Rodriguez held a "reasonable belief" of discipline hinges entirely on the facts and circumstances of the conversation at issue, on which Arbitrator Tamoush heard evidence at the hearing and then analyzed in his award. Specifically, the Arbitrator made numerous credibility determinations and found that "the expectation that [Rodriguez] might be disciplined as a result of Cooper's inquiry was unreasonable, considering all of the facts presented." [Ex. 11 at p. 6.]

The Charging Party and General Counsel also contend that the Arbitrator failed to consider certain "facts" in the record which purportedly make his decision "repugnant to the Act." For instance, they argue that the Arbitrator failed to consider: (1) that Rodriguez had recently been placed on a PIP; (2) that Rodriguez's performance was being monitored by Cooper; (3) that Cooper was inquiring about a job that had taken Rodriguez 5.5 hours to complete; (4) that Rodriguez failed to contact Cooper as required by his PIP; and (5) that Rodriguez was counseled shortly before the June 9 conversation for not calling his supervisor on a long duration job.

These assertions completely lack merit. The Arbitrator fully considered all evidence presented. The Arbitrator not only considered the matters presented at the hearing, but expressly incorporated the entire transcript into his award. [Ex. 11 at pp. 3, 6 ("The hearing itself was transcribed and those transcriptions *are incorporated herein by reference*"; "The expectation that [Rodriguez] might be disciplined as a result of Cooper's inquiry was unreasonable, *considering all of the facts as presented*.") (emphasis added).] Furthermore, even if specific facts were not presented, the relevant issues were before the Arbitrator, and deferral is proper. *See Martin Redi-Mix*, 274 NLRB 559 (1984) ("The Board is not prepared to engage in conjecture as to which way an arbitrator's decision may have shifted had certain additionally allegedly relevant facts come to light. . . . Our role is to ascertain whether the arbitrator was presented generally with the relevant facts necessary to consider the unfair labor practice.").

The Arbitrator made sound factual and credibility determinations in the context of the totality of the evidence and testimony presented in the hearing. For instance, the Arbitrator considered Rodriguez's repeated inconsistencies in his testimony, which made Rodriguez's alleged belief that he would be disciplined for failing to call his supervisor lack credibility.[5] In addition, the following facts considered by the Arbitrator prove that Rodriguez could not have had an objectively reasonable belief that he would be disciplined during the June 9 conversation with his supervisor:

[5] Rodriguez's testimony was all over the map. For example, Rodriguez initially testified that the Union was always present for his conversations with Cooper regarding his jobs [Ex. 10 at p. 278], but later testified he often had conversations with Cooper regarding jobs without the Union present. [*Id*. at pp. 281-282, 308.] Rodriguez also testified that he always had the Union present when he received discipline, yet admitted that he was never disciplined. [*Id*. at p. 278.] Rodriguez also testified that he never knew about Union representation and/or *Weingarten* rights until the morning of June 9, 2012. [*Id*. at pp. 291, 308.]

- Rodriguez claimed that he had "done a very good job" on the long duration job at issue — rebutting his belief that he could have been disciplined. [Ex. 10 at p. 291.]
- Rodriguez had been on numerous PIPs in the past, during which he had repeatedly been asked questions about his work by Cooper, and he had never been disciplined for his work performance. [*Id*. at pp. 47-52, 160, 278.]
- No one reporting to Cooper had been disciplined relating to a PIP for working long jobs or not meeting any "jobs per day" expectations. [*Id*. at pp. 49, 160.]
- The PIP at issue provided that Rodriguez only could be disciplined after discontinuation of the 12-month PIP period and Rodriguez's PIP had not yet been discontinued on June 9. [*Id*. at pp. 274-275.]
- The collective bargaining agreement prohibited any discipline based upon the GPS records that Rodriguez was questioned about without a prior warning (which he never received). [*Id*. at pp. 81-82, 86.]
- While Rodriguez claimed he refused to talk with Cooper because he was concerned about failing to call his supervisor, Cooper never raised this topic on the call, nor was it otherwise referenced on the call. [*Id*. at pp. 243-236, 290, 309.]
- The morning of the call with Cooper, Rodriguez sought advice from the Union because he felt his "supervisor was harassing him." In response, the Union improperly instructed him that he could seek union representation at any time. [*Id*. at p. 288.]

Notwithstanding the foregoing facts, the Charging Party asserts that "no substantial evidence supports the Arbitrator's decision" and that there is "no possible interpretation of the facts or of the Arbitrator's decision . . . that is consistent with the with the provisions and

protections of the Act." [Union's Brief at pp. 13:22-25, 19:1-2.] The Union makes this bold assertion even though Arbitrator Tamoush is a well-regarded arbitrator with many years of experience, whom the parties have chosen for numerous other prior cases. The parties had a full and ample opportunity to put on evidence, including testimony by Rodriguez, and it should be left to the Arbitrator to weigh such evidence and witness credibility in making a determination. In fact, the Board expressly rejected disagreement with an arbitrator's fact finding as a basis for denying deferral in *Kvaerner Philadelphia Shipyard Inc.* providing:

> In contending that deferral is not warranted in this case, our colleague argues that "there is no way to read the arbitrator's award as consistent with the Act." However, at the heart of our colleague's dissent is her disagreement with the arbitrator's ***factual determination*** that [employee] acted with reckless disregard for the truth. As noted above, we do not say that we would have made the same factual finding. ***We simply say that this factual finding of the arbitrator, who heard the relevant testimony, including the testimony of Smith, is one to which we would defer.*** And, given that arbitral finding, the arbitrator's decision to uphold the discharge is consistent with Board law… Thus, it is clear that the arbitrator's award is not inconsistent with the Act or palpably wrong.

347 NLRB 390, 394 (2006) (*emphasis added*).

Based on the evidence presented during the arbitration, there is nothing "palpably wrong" with the Arbitrator's finding in this case. Rather, the facts presented at the hearing, coupled with the credibility determinations made by Arbitrator Tamoush, amply support a finding consistent with the Act and supported by Board precedent. For example, in *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002), the Board held that an employee had no reasonable fear of discipline, even though the employee had recently been counseled, because it was not possible for the conversation to lead to discipline. As *Southwestern Bell Telephone Co.* demonstrates, the mere fact that Rodriguez was on a PIP does not require a conclusion that Rodriguez held a reasonable belief of discipline. Indeed, the evidence presented at the arbitration showed that Rodriguez had been on repeated PIPs, yet never been disciplined. [Ex. 10 at pp. 47-52, 160,

278.] Furthermore, the collective bargaining agreement would prohibit any discipline based upon the GPS records that Rodriguez was questioned about without a prior warning (which he never received). [*Id*. at pp. 81-82, 86.]

In short, this matter involves factual determinations by the Arbitrator that are consistent with, and supported by, Board authority, such that the award *cannot* be palpably wrong. Based on the undisputed evidence, the Arbitrator's decision undoubtedly is "susceptible of an interpretation consistent with the Act," warranting deferral. *See also Verizon New York*, 2008 WL 793689 (Rosas, ALJ, March 19, 2008) (ALJ holding that employee was not protected by *Weingarten* under similar facts).

The Union cites to numerous cases that allegedly refused deferral where the employee was involved in protected activity. [Union's Brief at p. 19:9-28.] But, each of these cases are legally and factually distinct because they involve situations in which employees were disciplined for engaging in Section 7 activity unrelated to *Weingarten*. *See United States Postal Service*, 332 NLRB 340 (2000) (refusing to defer where employees did not work overtime based upon a CBA provision which the arbitrator did not consider); *Mobil Oil Exploration*, 325 NLRB 176 (1997) (Gould concurring) (refusing to defer because arbitrator failed to address the unfair labor practice and disposed of the statutory issue using a just cause standard); *110 Greenwich Street Corp.*, 319 NLRB 331 (1995) (refusing to defer because the arbitrator failed to address Board law holding that display of signs demanding payment of wages is protected activity that is not controversial or disruptive); *Cone Mills Corp.*, 298 NLRB 661 (1990) (refusing to defer because arbitrator awarded reinstatement but no backpay even though it found that the employer violated the Act when it discharged the employee for protected activity); *Key Food Stores*, 286 NLRB 1056 (1987) (refusing to defer because arbitrator took into consideration the employee's

post-discharge picketing and internal union activities to support discharge); *Garland Coal & Mining*, 276 NLRB 963 (1985) (refusing to defer because arbitrator failed to consider whether employee's refusal to sign a document was protected activity); *NLRB v. Owens Maintenance Corp.*, 581 F.2d 44 (2d Cir. 1987) (refusing to defer because arbitrator failed to consider, among other things, that leafleting by the discharged employees was protected activity). Unlike each of the foregoing cases, the Arbitrator determined that Rodriguez did not have an objectively reasonable belief he might be disciplined as a result of his supervisor's routine inquiry, thus he was not engaging in protected activity when he refused to speak with his supervisor. Accordingly, unlike the cases cited by the Union, Rodriguez was not disciplined for exercising his Section 7 rights and there was no finding by the Arbitrator in this regard.

As the ALJ noted, even if there were some authority where the Board found, upon similar facts, that *Weingarten* rights did attach, this would not make Arbitrator Tamoush's award "palpably wrong." *Kvaerner Philadelphia Ship*, 347 NLRB at 393 (Cases going the other way "do not make the arbitrator's award palpably wrong because, . . . other Board decisions support a finding that [grievant] did lose the Act's protection. In light of those decisions, the arbitral award cannot be clearly repugnant."). Similarly, although the Charging Party and General Counsel believe the Board would have, or could have, reached a different result, it is not for the Board to disrupt the arbitrator's decision. *Id.* at 394; *see also Olin*, 268 NLRB at 574 ("an arbitrator . . . need not decide it in a manner totally consistent with Board precedent"); *Bell-Atlantic-Penn., Inc.*, 339 NLRB 1084 (2003) ("[T]he arbitrator's award need not be totally consistent with Board precedent to warrant deferral. Rather, it must not be repugnant to the Act.")

Here, the Arbitrator made factual determinations, including credibility determinations, as to whether the employee held a reasonable belief that he could be disciplined. It is simply not for the Board to undo such findings. This principle is at the core of the Board's deferral doctrine. The Board's deferral policy is supported by, "national policy strongly favor[ing] the voluntary arbitration of disputes." *Olin*, 268 NLRB at 574; *see also Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985) ("Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.").

In the end, the premise of the Amended Complaint is not really that Arbitrator Tamoush's award is repugnant to the Act but that the General Counsel disagrees with the result. This fundamentally mistakes the Board's role. "The Board's involvement is not in the nature of an appeal by trial de novo." *Badge Meter, Inc.*, 272 NLRB 824 (1984). But that result is exactly what the Amended Complaint seeks; and, therefore, the ALJ's decision and order should be affirmed and the Amended Complaint dismissed.

C. The Board Should Not Modify Its Post-Arbitration Deferral Standard In Accordance With The General Counsel's Position.

The Counsel for the General Counsel asks the Board to modify the *Spielberg*/*Olin* standard for deferral to an arbitrator's award in accordance with a Guideline Memorandum issued by the Acting General Counsel in 2011. *See Office of the General Counsel, Memorandum GC 11-05* (Jan. 20, 2011). Under the General Counsel's proposed revision, the party urging the Board to defer to the award would have the burden to demonstrate that: (1) either the collective-bargaining agreement incorporates the statutory right that allegedly was infringed or the

statutory issue was presented to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes those showings, then the Board would defer unless the award was clearly repugnant to the Act.

The General Counsel's proposed standard would gut deferral, ignoring decades of precedent and refusing to acknowledge the paramount importance of arbitration to federal labor policy. The General Counsel offers no reason to impair the vitality of labor arbitration by departing from the well-settled approaches to deferral in *Spielberg/Olin* — and there is none.

1. *The Spielberg/Olin Standard Furthers Federal Policy In Favor Of Arbitration.*

A sound deferral policy requires reaffirmation of the deferral standard of *Spielberg/Olin* and rejection of the approach urged by the General Counsel. The current *Spielberg/Olin* standard of deferral advances the federal policy favoring arbitration, fosters collective bargaining, and fulfills the Board's statutory responsibilities. At the same time, deferral under *Spielberg/Olin* serves the Board's mandate by ensuring that statutory rights are not undermined by a collective bargaining agreement. Deferral pursuant to *Spielberg/Olin* standards furthers the fundamental aims of the Act and national labor policy.

a. *Federal Labor Policy Favors Arbitration.*

Arbitration is the cornerstone of federal labor policy as expressed by Congress. The National Labor Relations Act's fundamental statement of policy in Section 1 "encourage[es] practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151. Through the Labor Management Relations Act, Congress has further declared that arbitration, which itself is a product of collective bargaining, is the bedrock of federal labor policy. 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is hereby declared to

be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.").

The Supreme Court also repeatedly held that arbitration is paramount to federal labor policy. *See generally, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 472 U.S. 614 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); and the so called "*Steelworkers Trilogy*" (*Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). The *Steelworkers Trilogy* confirmed the centrality of arbitration in furthering the congressional goal of facilitating labor peace. *See Steelworkers v. American Manufacturing Co.*, 363 U.S. at 567 ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement.") (emphasis added); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. at 578 ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596 ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.").

Under federal labor law, the collective bargaining agreement is "more than a contract"; because it is a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. at 578. Since the collective bargaining agreement covers "the whole employment relationship," it "call[s] into being a new common law — the common law of a particular industry or of a particular plant" because it is "an effort to erect a system of self-government." *Id.* at 579-80. The grievance-arbitration machinery is "at the very heart" of this system of industrial self-government." *Id.* at 581.

In cases following the *Steelworkers Trilogy*, the Court continued to emphasize the strong national policy favoring arbitration of labor disputes. *See e.g., Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) ("Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. . . ."); *Boys Markets, Inc. v. Retail Clerks Union, Local 776*, 398 U.S. 235, 251 (1970) (endorsing arbitration and other "administrative techniques for the peaceful resolution of industrial disputes"); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377 (1974) ("The federal policy favoring arbitration of labor disputes is firmly grounded in congressional demand.").

For more than five decades, the prime imperative of federal labor policy is that day-to-day disputes should be arbitrated unless it can be said with "positive assurance" that the parties have refused arbitration, and once arbitrated, the resolution should rarely be disturbed. *See Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977); *Gateway Coal Co. v. Mine Workers Dist. 4, Local 6330*, 414 U.S. 368, 377 (1975); *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 764 (1983); *Enterprise Wheel & Car*, 363 U.S. at 597-98.

b. A Strong Policy Of Deferral Facilitates Federal Labor Policy.

Labor arbitration is not merely an alternative means of dispute resolution — rather it is part and parcel of the collective bargaining process fostered by the Act. When the Board addresses deferral, its policy does not simply balance efficiency versus a thorough adjudication. Instead, the Board must balance preservation of a critical element of federal labor policy against the incremental review of particular events.

As far back as 1962, the Board determined that the policies announced by the Court in the *Steelworkers Trilogy* applied to *Spielberg/Olin* deferral. The Board reasoned:

> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for *final and binding* arbitration of grievances and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.

International Harvester Co. (Indianapolis Works), 138 NLRB 923, 926 (1962), *aff. sub. nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (emphasis added). The Supreme Court adopted this statement in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964). Thus, the Board's well-established policy where the parties have committed to pre-dispute arbitration is to defer to the arbitrator's decision unless the arbitration proceedings themselves are unfair or irregular or the award is clearly repugnant to the National Labor Relations Act. By adopting this standard, the Board ensures finality and certainty in arbitral awards, advances the national policy favoring arbitration, and facilitates the primary objective of the Act: to encourage collective bargaining.

A strong policy of deferral to arbitral awards is not an abdication of the Board's statutory responsibility to prevent unfair labor practices; the *Spielberg/Olin* criteria ensure otherwise. *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974) ("[T]he Board does not abdicate its responsibilities . . . by respecting peaceful resolution of disputes through voluntarily agreed-upon procedures as long as it is assured that those techniques are procedurally fair and that the resolution is not clearly inconsistent with or repugnant to the statute." Even if the Board might conclude that there is a risk in a particular case of a "wrong" result, that risk is a tiny price to pay for the protection of the broader policies of the Act. *NLRB v. Pincus Brothers*, 620 F.2d 367, 374 (3d Cir. 1980) ("[T]he societal rewards of arbitration outweigh a need for uniformity of results or a correct resolution of the dispute in every case.") The parties themselves have also accepted that an arbitrator might decide a particular set of facts under the agreement differently

than would the Board. *See id.* ("[T]he parties are not injured by deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process.").

In light of the strong federal policy favoring deferral, the Board just recently declined to consider adopting the General Counsel's proposed standard and instead issued a decision relying on the long-standing principles of *Spielberg/Olin*. *See IAP World Services, Inc.*, 358 NLRB No. 10 (2012) (upholding deferral by applying *Spielberg/Olin* where the arbitrator found just cause for discipline).

2. *The General Counsel's Proposed Standard Undermines Arbitration And Collective Bargaining.*

The question before the Board is when, if ever, the disposition of a contract grievance by arbitration should yield to the Board's jurisdiction over a parallel unfair labor practice charge. Without identifying any empirical problem with the Board's traditional deferral to arbitrators' awards, the General Counsel proposes reducing the standard of deferral to what in effect would be plenary review by the Board. The party asking the Board to defer to the arbitrator's decision would be obliged to prove that the statutory question was reviewed, and, for all practical purposes, the arbitrator must have decided the ULP case properly. *Office of the General Counsel, Memorandum GC 11-05*, at pp. 6-7 (Jan. 20, 2011).

"[S]ubmission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would have given *de novo* consideration to the issue which the arbitrator might resolve." *Associated Press*, 492 F.2d at 667. It would be ironic that deferral to labor arbitration would be at its lowest point when it is the enforcement of the Act itself which is purportedly at risk.

Although deferral arguably might, in the eyes of some, leave an unfair labor practice unremedied — and for reasons discussed below that is almost impossible — the cost of the modification that the General Counsel urges would be to undermine what the Supreme Court has long held to be the focus of congressional policy.

Moreover, the General Counsel has identified no reasoned basis to modify the deferral afforded under the *Spielberg/Olin* standards. In relying upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456 (2009) in support for the General Counsel's effort to constrain deferral, the General Counsel confuses the forest for the trees. *Gilmer* and *Penn Plaza* advance a Congressional policy favoring arbitration even for statutory claims. In fact, these cases indicate that the arbitrator sits in the place of a judge or jury to determine, in a single proceeding, whether or not the particular statute has been violated. *Spielberg*/*Olin* also advance a federal policy of the importance of arbitration to federal labor policy. To preserve that primacy, the Board has long held that there generally cannot be parallel unfair labor practice proceedings and arbitrations involving the same nexus of facts. Here, statutory rights would not be preserved based upon the General Counsel's insistence that the Arbitrator decide the case in the same manner as the Board because that would convert deferral into a two-bite-at-the-apple rule, as explained in more detail below.

The *Spielberg/Olin* procedural standards — that the parties agree to be bound and that the proceedings appear to be fair — have not been difficult to apply. Similarly, the substantive standard — that the result is not clearly repugnant to the policies and purposes of the Act — is also neither unclear nor difficult to apply, although the Board on occasion has failed to grant the deferral that *Spielberg*/*Olin* contemplates. *See e.g., Liquor Salesmen's Union, Local 2 v. NLRB*, 664 F.2d 318, 323-24 (2d Cir. 1981) (hereinafter *Charmer Industries*). The term "clearly

repugnant" has a narrow scope by virtue of the modifier "clearly." If an arbitration award is susceptible of an interpretation that is plausibly consistent with the provisions of the Act, the award cannot be clearly repugnant to it. *See Associated Press*, 492 F.2d at 667 (upholding Board's deferral to arbitration award where it concluded that "the arbitrator's reasonable interpretation was not inconsistent with either the fundamental purposes of the specific provisions of the sections of the National Labor Relations Act which is at the duty of the Board to implement…"); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354-55 (9th Cir. 1979) (asserting that the Board should have deferred to the arbitrator's decision because "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act."); *Pincus Brothers*, 620 F.2d at 374 ("[W]e conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with the Board policy.").

Therefore, in light of the foregoing, even if the arbitrator here applied the incorrect statutory standard — which he did not — the Board has held under *Spielberg*/*Olin* that the decision would still warrant deferral as long as the decision is not inherently repugnant or "palpably wrong." *Aramark Services Inc*., 344 NLRB 549 (2005). Again, unless the award is *not susceptible* to an interpretation consistent with the Act, the Board will defer. *Id.*; *see also Smurfit-Stone Container Corp*, 344 NLRB at 659-60 (noting also, that the Board will not find an imperfectly drafted decision clearly repugnant, provided that a reasonable interpretation of the award is consistent with the Act).

The narrow deferral approach proposed by the General Counsel views arbitration as an inferior means to resolve statutory questions. The radical change advocated by the General

Counsel requires that, in order for the parties to have any degree of certainty that the Board will defer, the unfair labor practice *must* be litigated *and* decided in *exactly* the same manner as it would have been decided by the Board. That is, deferral is warranted only if the arbitrator makes the exact same factual determination, and applies Board precedent in a written decision that resolves the unfair labor practice *precisely* as the Board would do. This approach in effect mandates turning arbitrators into *de facto* administrative law judges, or adjudicators who ultimately make mere recommendation; a result that is inconsistent with the strong national policy *favoring* a final disposition of the parties' dispute through arbitration.

Narrowing the set of cases in which the NLRB defers to arbitration awards will invite abuse. It guarantees re-litigation of issues resolved by the arbitrator any time the General Counsel disagrees with the result or where the Board discovers in hindsight some facts, arguments or legal theories not adduced in arbitration. Such an approach invites parties to squirrel facts and arguments, and virtually assures a "second bite of the apple." Such a formulation is not deferral at all.

Moreover, by narrowing the standard the Board would assure yet more litigation in the courts in each deferral case. Prior to the *Olin* standard, the courts of appeals in at least six circuits found that the Board had abused its discretion in failing to defer to arbitral awards under *Spielberg*. *See, e.g.*, *Douglas Aircraft*, 609 F.2d at 355; *Pincus Brothers*, 620 F.2d at 367; *Charmers Industries*, 664 F.2d at 327; *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734 (4th Cir. 1982); *American Freight Sys. v. NLRB*, 722 F.2d 828 (D.C. Cir. 1983); *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499 (5th Cir. 1983). These courts essentially reversed Board decisions declining to defer to arbitral awards using a standard that is comparable to what the General Counsel currently proposes. A modification back to the pre-*Olin* standard, as the Board's

General Counsel advocates, is likely to result in the courts once again finding that the Board has abused its discretion.

Finally, the General Counsel's proposal for review of arbitrators' decisions misconceives both the Board's role and the arbitrator's role in federal labor policy. The parties to a collective bargaining agreement have agreed to be bound by an arbitrator's interpretation of their agreement. That interpretation may be disturbed only if it does not "draw its essence" from the contract. *See Enterprise Wheel*, 363 U.S. at 597. The Board should protect employee rights only in those rare circumstances where that interpretation of the collective bargaining agreement is repugnant to the Act. The Board's function does not depend upon the *quality* of the arbitrator's reading of the agreement, but only upon the outcome of that reading. As expressed by Judge Harry Edwards:

> The obvious fallacy in the Board's analysis is its contention that there is a statutory issue apart from the contractual issue. This case [in ruling on a refusal of an employee to perform work] involves solely a contractual claim, not an unfair labor practice claim. . . . In other words, assuming, arguendo, that an individual employee has a right under the NLRA to refuse to work in order to pursue a contract claim that is not in fact "justified" but only supported by a "good faith" belief of wrongdoing, that alleged right was waived by the collective bargaining agreement in this case.

American Freight, 722 F.2d at 832. The arbitrator's interpretation of the agreement is what it is, and the only question for the Board is whether the agreement as interpreted by the arbitrator violates the Act.

The General Counsel's effort to assign to the arbitrator a dual role of deciding both a statutory issue independent of the contract and a contractual issue interpreting and applying the contract gives the arbitrator both too much and too little responsibility. Likely his interpretation of the contract, as Judge Edwards suggests, itself will answer the statutory question. If after the

contract has been interpreted, that interpretation is clearly repugnant to the Act, then it is the Board's responsibility to say so. And if that interpretation is not clearly repugnant to the Act, then it is the Board's duty to defer to the arbitrator's decision.

D. The ALJ's Decision Should Be Upheld Even Under The General Counsel's Proposed Standard Because The Arbitrator Enunciated And Applied Correct Weingarten Principles.

Notwithstanding the fact that the General Counsel's proposed new standard would impair the longstanding federal labor policy favoring arbitration, even if the proposed standard is implemented, the Board should nevertheless defer to Arbitrator Tamoush's award because the Arbitrator properly enunciated and applied the correct *Weingarten* standard.

As the ALJ correctly noted, Arbitrator Tamoush's award enunciated the correct *Weingarten* standard by expressly incorporating the standard articulated in the recent decision by arbitrator William Petrie in the *Walker* award:

> The *Weingarten* criteria and standards are laid out in the detailed exposition of Arbitrator William Petrie in Grievance Number 2009 03 00068 (NLRB Deferral Case Number 31-CA-29411) that the Undersigned adopts his rationale and discussion regarding *Weingarten* and attaches it to this award so that the reader, whether the parties or the NLRB representative can incorporate his reasoning in their analysis as well.

[Ex. 11 at p. 6; *see also* Decision at 9:5-37.] The *Walker* award, which was attached to Arbitrator Tamoush's award, enunciated the correct *Weingarten* standard in great detail by quoting the frequently cited and authoritative treatise authored by Elkouri and Elkouri. [Ex. 11 at pp. 19-20.] More specifically, the *Walker* award enunciated that the standard for determining the reasonableness of an employee's belief is an objective one:

> . . . The 'reasonableness' of an employee's belief that discipline might result will be determined 'by *objective* standards under all the circumstances of the case.' There is a risk that the employee's belief may be found unreasonable. If an employee disobeys an order to meet with management in the erroneous belief that

> discipline may result and he or she is entitled to union representation, discipline for insubordination may be upheld . . . .
>
> On these bases, therefore, the outcome of this proceeding depends on the presence or absence of "*objective standards*" establishing the Grievant's reasonable belief that her participation in the requested meeting with management on March 9, 2009, could have led to discipline. In the absence of such a reasonable belief, her refusals to comply with the direct orders of [her supervisors] would normally support her discipline for insubordination.

[Ex. 11 at pp. 20-21 (*citing* Elkouri & Elkouri, How Arbitration Works, pg. 233-235) (emphasis added).] There is no dispute that this is the correct standard to be applied with respect to any *Weingarten* issue.[6] In addition, there should be no issue with the fact that Arbitrator Tamoush incorporated the standard articulated in Arbitrator Petrie's award. This is no different than if Arbitrator Tamoush had simply referred to or attached the pages of a legal treatise (*e.g.*, The Developing Labor Law) instead of copying and pasting its contents.

Moreover, also as the ALJ correctly noted, Arbitrator Tamoush expressly applied the correct standard enunciated above when issuing his award. [Decision at 9:5-37.] In fact, Arbitrator Tamoush expressly rejected applying an incorrect "subjective" standard sought by the Union when analyzing the reasonableness of Rodriguez's belief:

> . . . the Union's argument is that whenever an employee *subjectively believes* that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing from a supervisor or manager could refuse to respond. Some employees, perhaps have such a "guilt complex" that they unreasonably believe that discussion could result in discipline.

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[6] The Union argues that Arbitrator Tamoush improperly adopted the "rationale and reasoning" of Arbitrator Petrie because it involved a different set of facts as the instant case. However, as the ALJ noted, Arbitrator Tamoush simply adopted Arbitrator Petrie's summary of the *Weingarten* law and then applied his own *Weingarten* analysis to the Rodriguez facts.

[Ex. 11 at p. 6.] The Arbitrator's decision hinged on the objective reasonableness of Rodriguez's belief that his conversation with his supervisor could lead to discipline. Having applied the correct objective standard to an inherently fact-specific inquiry, Arbitrator Tamoush determined Rodriguez's alleged belief that he could have been disciplined was not credible.

Therefore, even under the General Counsel's proposed new deferral standard, the ALJ's decision to defer should be upheld. This shows that the Charging Party and the General Counsel are not so much attacking the legal standard applied by the Arbitrator; but, rather, the sheer outcome of the case based on the Arbitrator's factual evaluation and credibility determinations. This is not proper — the ALJ's decision must be affirmed and the Amended Complaint must be dismissed.

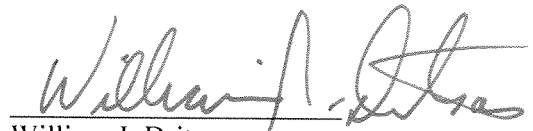
IV. CONCLUSION

For the foregoing reasons, the Board should affirm the ALJ's factual and legal rulings, findings, and conclusions and adopt the recommended Order dismissing the Amended Complaint against Verizon. The ALJ correctly found that the award issued by Arbitrator Philip Tamoush was not clearly repugnant to the Act and deferred to the award pursuant to the well-established, post-arbitration deferral standards set forth in *Spielberg/Olin*. The Amended Complaint is nothing more than an attempt to re-litigate whether Rodriguez's *Weingarten* rights were implicated when he refused to participate in a conversation with his supervisor. The Charging Party and Counsel for the General Counsel's unhappiness with Arbitrator Tamoush's factual findings should not be allowed to effectively gut the Board's established deferral policy. In addition, Verizon respectfully requests that the Board decline the General Counsel's request to modify the Board's deferral standard in a manner that would impair the longstanding federal labor policy favoring arbitration. Nevertheless, even under the proposed deferral standard sought

by the General Counsel, deferral to Arbitrator Tamoush's award would be appropriate and would not change the outcome in this case.

Dated: May 19, 2014

Respectfully Submitted,
SEYFARTH SHAW LLP



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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, a true copy of **Respondent's Answering Brief to the Charging Party and Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision** was submitted by e-filing to the National Labor Relations Board. I further certify that I caused the foregoing document to be served through electronic mail delivery in accordance with Rule 102.114 of the Board's Rules & Regulations upon:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of May, 2014, in Los Angeles, California.

Karla Villalobos-Roque

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